FILED
SEP 24 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-299 / 90-1204

IN RE THE MARRIAGE OF JANICE V. CULBERTSON and JERRY CULBERTSON,

Upon the Petition of

JANICE V. CULBERTSON,

Appellee,

And Concerning

JERRY CULBERTSON,

Appellant.

57

Appeal from the Iowa District Court for Jackson County, Charles H. Pelton, Judge.

Respondent appeals from the custody, child support, property, and attorney fees provisions of a default dissolution decree. He complains that because he was unaware of the trial date, he was not afforded an opportunity to contest the default judgment entered against him. He challenges the court's jurisdiction to enter the decree, and argues that he has been denied due process by his failure to receive notice of the trial. **AFFIRMED.**

Larry F. Woods, Oelwein, for appellant.

Corliss C. Baty, Maquoketa, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Janice and Jerry Culbertson were married on June 26, 1965. Two of their three children will be affected by these proceedings. Sean was born October 24, 1977; and Jody was born April 12, 1971. Jody is currently a college student.

Jerry is now fifty-six; Janice is fifty-two. Throughout the marriage both parties worked, but at the time of the district court proceedings Jerry was receiving tax free social security disability benefits of $1,361 per month due to his rheumatoid arthritis. Janice was employed by the Maquoketa school system earning a net monthly income of $1,627.

The district court dissolved the parties' marriage on July 10, 1990, conducting a default proceeding in Jerry's absence. The court divided their assets, established child support, and set all other provisions of the decree based on the record established by Janice. The court found that during the pendency of these proceedings Jerry had violated numerous court orders and had converted property and monies from the parties' joint checking account to his own use.

After establishing values for the parties' assets, the court awarded Janice the parties' homestead, two vehicles and a horse trailer, her savings bonds and checking account, certain farm equipment, and ordered her to pay Jerry $6,100 to equalize the property division. The court granted Janice custody of the parties' two children

affected by the decree, and awarded Jerry only limited, supervised visitation. The trial court ordered Jerry to pay $3,600 toward Jody's college expenses. The court directed Jerry to pay child support in the amount of $424 per month, which is the amount of social security disability benefits designated for the benefit of Sean, plus the amount of any future increases in social security disability benefits for him. The decree ordered Jerry to return his son's Shetland pony and the original birth certificates of the children. Finally, the court ordered Jerry to contribute $2,500 toward Janice's attorney fees.

On appeal Jerry cites a long procedural history of the events leading to the entry of the dissolution decree. Prior to entry of the decree, Jerry's lawyer filed an application and was granted permission to withdraw from continued representation of Jerry. The court file does not reveal whether subsequent pleadings were served on Jerry. However, Jerry's attorney asserted in his application to withdraw that he had been in contact with his client and had fully advised him on numerous occasions to obtain other counsel. Apparently, Jerry elected not to obtain other counsel, and various pending matters were never ruled upon prior to the entry of the trial court's dissolution decree.

After the decree was filed, Jerry obtained counsel and rather than filing a motion to set aside the dissolution

decree, which had been entered against him as a default judgment, he elected to file a notice of appeal.

On appeal Jerry's first three arguments challenge the district court's subject matter jurisdiction. Jerry first contends the case must be remanded for a new trial because the trial court did not have jurisdiction to schedule the matter for trial. Second, he asserts that the trial court lacked jurisdiction because Janice did not file a proof of service on the trial certificate. Third, he argues that the trial court's order setting a trial date was erroneous because there were motions pending, which challenged the court's authority to schedule the trial.

Jerry's fourth argument asserts that he has been denied due process of law by the procedures used by the trial court to establish a trial date and by his failure to receive notice of the trial. Jerry's fifth argument asserts that the dissolution decree is void because the court had failed to order conciliation under Iowa Code section 598.19, and the conciliation period had not yet expired.

Jerry's next five arguments address the merits of the trial court's dissolution decree. He contends that if the decree is found to be valid, he should receive joint custody of Sean and reasonable, unsupervised visitation. He asks the court to modify his child support obligation for Jody to $25 per month. He asks the court to modify the parties' property distribution by ordering the sale of the

real estate, crops, vehicles, and farm equipment and equally dividing the net proceeds. Finally, he requests that the court eliminate the award to Janice of attorney fees.

Janice maintains that most of Jerry's arguments on appeal should not be considered. She contends that Jerry has failed to properly preserve these issues for appeal. She asks that the district court's decree be affirmed and that she be awarded attorney fees on appeal.

I. **Scope of Review.** Our review of dissolution proceedings is de novo on issues properly raised of record in the trial court. In re Marriage of Huston, 263 N.W.2d 697, 699 (Iowa 1978). Our review of default divorce decrees is also de novo, but it is review de novo, not trial de novo or trial anew. Id. Therefore, a defaulting party may seek appellate review on the merits, but our de novo review is limited to (1) the scope of relief granted, and (2) the equities of the decree as determined by an examination of the entire trial record. Id.

II. **Error Preservation.** We must first determine whether the issues presented for our review are properly before us. Generally, questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). Even issues of constitutional magnitude will not be addressed by an appellate court unless they were first presented to the trial court. In the Interest of

W.E.G., 342 N.W.2d 900, 901 (Iowa App. 1983). However, we do recognize certain exceptions to this rule.

When the trial court has entered a default judgment, the defaulting party cannot have preserved any specific issues for our review. In re Marriage of Huston, 263 N.W.2d at 700. We therefore limit the issues we will address as indicated by our scope of review. Nevertheless, we consider the issue of the basic fairness of the decree's provisions to be properly before us. Id. Likewise, the question of whether the district court had subject matter jurisdiction may be raised at any stage of the proceedings. Matter of Dull's Estate, 303 N.W.2d 402, (Iowa 1981).

III. Subject Matter Jurisdiction. Jerry's first three arguments challenge the trial court's subject matter jurisdiction to enter the default judgment.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings belong. City of Clinton v. Owners of Property Situated Within Certain Described Boundaries, 191 N.W.2d 671, 677 (Iowa 1971). Subject matter jurisdiction is given to the court solely by constitutional or statutory authority. Matter of Guardianship and Conservatorship of Cervan, 334 N.W.2d 337, 340 (Iowa App. 1983). It can neither be conferred on the court nor denied to the court by the acts or procedures of the parties. In re Marriage of Helm, 271 N.W.2d 725, 727 (Iowa 1978).

Jerry contends that the actions of the trial court itself deprived it of subject matter jurisdiction. In support of his argument, Jerry relies upon a particularly deceptive wording of the definition of subject matter jurisdiction found in Matter of Adoption of Gardiner, 287 N.W.2d 555 (Iowa 1980). In that case, the supreme court stated "When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter." See Matter of Adoption of Gardiner, 287 N.W.2d at 559 (citing State ex rel. Cairy v. Iowa Co-Operative Assoc., 248 Iowa 167, 169-70, 79 N.W.2d 775, 776 (1956)). Upon examining the context of and the authority cited for this principle, we are convinced that this statement is no more than an awkward definition of subject matter jurisdiction. We interpret the statement to mean: to lack subject matter jurisdiction is to act without legal authority. As such, the statement is a definition and does not refer to a method by which the court can inadvertently divest itself of subject matter jurisdiction.

Clearly, the Iowa district courts have subject matter jurisdiction to hear marriage dissolution cases. We find the trial court in this case had subject matter jurisdiction.

IV. Due Process. Jerry's fourth argument asserts that the trial court's procedures deprived him of due process of law. Jerry did not present this argument to the trial court. The issue is not properly before us.

V. Conciliation. Jerry's fifth argument asserts that Iowa Code section 598.19 prohibited the trial court from proceeding because conciliation had not been completed. Jerry did not present this issue to the trial court, and it is, therefore, not properly before us.

VI. The Merits of the Decree. Jerry's next five arguments challenge the merits of the dissolution decree.

A. Custody & Visitation. Jerry contends the trial court erred in awarding Janice sole custody and physical placement of Sean, the parties' minor son. He argues there is insufficient evidence in the record to justify the trial court's failure to award joint custody. For the same reason, he challenges the trial court's order that his visitation rights be limited to Janice's discretion and that his visitation be supervised.

In deciding child custody issues, the best interest of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child;

gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Iowa Code section 598.41(2) (1991) provides "On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody." Neither party requested joint custody. It is clear that Jerry did not request joint custody in his responsive pleading, nor did he make separate application for joint custody. Janice did not request joint custody either. Thus, the issue of joint custody was not placed before the trial court and is not properly presented for our review.

In the Court's Settled and Approved Record prepared pursuant to Iowa Rule of Appellate Procedure 10(c), the trial court states that Janice testified in accordance with her affidavits in support of an injunction and two applications for contempt. Janice's affidavits allege that Jerry has on various occasions broken into her home; harassed her and the children; threatened to take the children and remove them from Jackson County or the state; taken the children out of school with the intention of removing them from the state; verbally abused her and the children; publicly accused her of sexual misconduct, embezzlement, and child abuse; filed frivolous lawsuits against her; and even initiated spurious commitment

proceedings against her. The trial court found the Proposed Decree, prepared by Janice's counsel to be consistent with the evidence presented. The decree states that Jerry has "caused great emotional and mental distress to [Janice] throughout the pendency of this action, and has further caused great emotional and mental distress on his children." On this record, we affirm the trial court's award to Janice of the sole custody of Sean.

For the same reasons, we affirm the trial court's award to Jerry of limited, supervised visitation. In determining visitation rights, the governing consideration is, as always, the best interest of the child. Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). We have stated that liberal visitation rights are in the best interest of the child. In re Marriage of Kerber, 433 N.W.2d 53, 54 (Iowa App. 1988), In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). This prescription must be rewritten, however, when "direct physical harm or significant emotional harm to the child . . . is likely to result from such contact with one parent . . . ." Iowa Code § 598.41(1) (1991). We find sufficient evidence in the record to support the visitation provisions of the decree. On the issues of custody and visitation, the decree is not so inequitable or unjust as to mandate appellate modification. See In re Marriage of Huston, 263 N.W.2d at 700.

B. **Child Support.** The trial court ordered Jerry to pay a total of $3,600 toward Jody's college education. Jody was nineteen years old at trial and was enrolled as a college student. We find nothing in the record to suggest that this award is so inequitable or unjust as to mandate appellate modification. We affirm the award.

C. **Property Distribution.** Jerry argues that the trial court's distribution of the parties' property is inequitable. He contends that Janice was awarded net assets in excess of $45,350, and that he was awarded net assets totaling $17,500. Jerry fails to take into account his cash property award of $6,100 to be paid by Janice. He also fails to account for his award of the majority of the miscellaneous personal property valued by the court at over $10,000. We find that the trial court's award left a discrepancy of approximately $15,000 in the value of the parties net assets. Under the circumstances of this case, such a discrepancy does not necessitate a finding that the property distribution is inequitable.

The partners in the marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

The most substantial of the parties' assets is clearly the homestead with a net value of $60,000. This asset comprises approximately forty-four percent of the parties' total net worth. Iowa Code section 598.21(1)(g) states, as a factor to be considered in dividing the property, "[t]he desirability of awarding the family home . . . to the party having custody of the children . . . ." Considering the overall distribution, as affected by the award of the house to Janice, we do not find the property distribution to be so inequitable or unjust as to mandate appellate modification. We affirm the trial court's division of the property.

D. **Trial Attorney Fees.** Jerry challenges the trial court's order that he pay $2,500 toward Janice's trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We find the trial court's award to be reasonable.

E. **Appellate Attorney Fees.** Both parties request an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's

discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We order Jerry to pay $1,000 toward Janice's appellate attorney fees.

The costs of this appeal are taxed to Jerry.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.